UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM L. BURRELL, JR.	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 99-107-P-C
	)	
BOARD OF TRUSTEES OF THE UNIVERSITY OF MAINE SYSTEM, et al.	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON PLAINTIFF'S MOTION TO AMEND AND DEFENDANTS' MOTIONS TO DISMISS

Plaintiff, appearing *pro se*, brings this action against the Board of Trustees of the University of Maine System (the "University Defendants") and the following persons associated with the University: Carl Hill, Judy Ryan, Craig Hutchinson, Helen Gorgas, Arran Haynes, Heather Monroe, and Richard Pattenaude (the "Individual University Defendants"). Plaintiff also asserts claims against Peter Rodway, Jean Kaestner and Elizabeth Finlayson. Presently before the Court are Plaintiff's Motion to Amend (Docket No. 32) and Defendants' Motions to Dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). (Docket Nos. 40, 41, 42). For reasons explained below, the Court GRANTS Plaintiff's Motion to Amend and GRANTS Defendants' Motions to Dismiss.

Procedural Background

Plaintiff filed the Complaint in this action on April 2, 1999 and an Amended Complaint adding certain Defendants on April 30, 1999. The Defendants responded by filing motions to dismiss. Plaintiff then filed a motion for leave to amend the Complaint on June 3, 1999 and on August 10, 1999. This Court issued an Order on August 18, 1999, striking those motions for leave filed by Plaintiff and granting Plaintiff "leave to file one Motion for Leave to Amend Complaint, together with a copy of the proposed Amended Complaint in its entirety." Court Order dated August 18, 1999 at 2. Plaintiff then filed a motion for leave with an attached Amended Complaint on September 7, 1999. This Court issued an Order dated November 12, 1999 which found that Plaintiff's Proposed Amended Complaint failed to comply with Fed. R. Civ. P. 8 because it did not "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Court then granted Plaintiff leave to file a Proposed Amended Complaint. Plaintiff filed the Proposed Amended Complaint on November 29, 1999. Defendants filed their Motions to Dismiss the Proposed Amended Complaint and Plaintiff filed his Responses to those motions.

1. Motion for Leave to File the Proposed Amended Complaint

Plaintiff seeks leave to file the Proposed Amended Complaint pursuant to Fed. R. Civ. P. 15(a). Under Fed. R. Civ. P. 15(a), a party must seek leave of the court to amend a pleading after the time period for amending the pleading without leave expires. Leave to amend "shall be granted when justice so requires." Fed. R. Civ. P. 15(a). The rule "evinces a definite bias in favor of granting leave to amend." *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1178 n. 11 (1st Cir. 1995) (citing *Jamieson v. Shaw*, 772 F.2d 1205, 1208 (5th Cir. 1985)). However, leave to amend may be denied under certain circumstances which include, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Defendants filed objections to Plaintiff's motion to amend. In the Court's Order dated November 12, 1999, the Court stated that Defendants may either stand on their objections to the Motion to Amend or file additional objections once Plaintiff filed the Proposed Amended Complaint. Instead, Defendants filed Motions to Dismiss to Plaintiff's Proposed Amended Complaint and Plaintiff filed his Response. Accordingly, the Court will construe Defendants filing their Motions to Dismiss as

a waiver of their objection to Plaintiff filing his Amended Complaint and recommend that Plaintiff's Motion for Leave to file the Proposed Amended Complaint be GRANTED.

Motion to Dismiss Standard

When determining whether to grant a Motion to Dismiss, "the Court must accept as true all factual allegations in the Complaint, construe them in favor of Plaintiff, and decide whether, as a matter of law, Plaintiff could prove no set of facts which would entitle him to relief." *Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993) (citing *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 25 (1st Cir. 1987)). A *pro se* plaintiff is entitled to special deference when the Court construes his or her pleadings. *Jackson*, 834 F. Supp. at 473. Civil rights complaints are subject to the normal standards of pleading. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, (1993); *Also see Gerakaris v. Champagne*, 913 F.Supp. 646, 652 (D. Mass. 1996) ("Although *Leatherman* applies only to § 1983 claims against municipalities, the logic of the Court's reaffirmation of the sufficiency of the rule of notice pleading in that context has no less force in cases involving civil rights claims against individual government officials.").

Factual Background

Plaintiff was a student at the University of Southern Maine (USM) in the Spring and Summer of 1998. Complaint ¶39. In both the Spring and Summer of 1998 Plaintiff was employed in a work-study position at Student Legal Services ("SLS") at USM. This action arises out of the USM Student Senate's dismissal of Plaintiff from that position after it determined that Plaintiff misrepresented his position and authority as an intern at SLS.

The USM Student Senate performs several functions including managing the USM student activity fee, and educational, cultural, and recreational programs that are funded by the fee. Complaint ¶28. The SLS is an organization that is funded by the activity fee, managed by the USM Student Senate, and staffed by USM students. *Id.* The dispute between Plaintiff and other students at SLS arose out of the "client intake process". Under the "client intake process", members of the public talk to students at SLS about their potential legal problems and why they need to see an attorney. An agreement is entered into in which the "client" and SLS agree to keep the information confidential. Plaintiff expressed concern to Tracy Stover, the student-coordinator of SLS, that Stover's friends and Heather Monroe and Melissa Gower, students working at SLS, caused distractions during the process and that these

same persons had access to the confidential information in violation of the USM Conduct Code and federal law. Complaint ¶41.

In response to Plaintiff's complaints, Stover issued a memo stating that SLS offices should not be used as a "hang out" and noted that distractions caused by interns should cease. Complaint ¶42. Heather Monroe, a fellow student-intern at SLS told Plaintiff that she was disappointed in Stover's memo and told Plaintiff she intended to take Stover's job. Complaint ¶43. Plaintiff told Stover what Monroe had told him, and Stover confronted Monroe about her comments to Plaintiff. Following their discussion Stover issued a second memo that rescinded her first one. Complaint ¶46.

On April 21, 1998, Plaintiff wrote Stover a letter stating that he strongly disagreed with the second memo because it was a serious violation of the rules and he would not go along with the violation. Complaint ¶47. Stover "blew up" at Plaintiff but later apologized. Plaintiff made repeated complaints to Craig Hutchinson, Assistant Vice President of Student Development, and Carl Hill, Chief Conduct Officer of Student Judical Affairs, about the violations occurring at SLS. Complaint ¶47. Plaintiff later met with Huchinson to document what he considered to be several violations occurring at SLS including, discriminatory employment practices, violations of State Guidelines, inadequate supervision of interns,

inadequate resources, and violations of both the UMS Conduct Code and Federal Law. Complaint ¶51. Hutchinson told Plaintiff that while he agreed that an unpleasant work environment existed at SLS he did not see how Plaintiff had been personally wronged. Complaint ¶54.

Sometime after the meeting Peter Rodway, acting attorney on behalf of undergraduate students at USM, asked Plaintiff why was he taking his complaint to SJA and further told Plaintiff "not to rock the boat" and that he did "not want to lose his crew" at SLS. Complaint ¶55.

Stover later resigned as Senator and Coordinator of SLS and elections were held for a new student senate. Complaint ¶¶56-57. Over Plaintiff's objections about Monroe, Carl Hill, Craig Hutchinson and the Student Senate allowed her to become the new Coordinator at SLS. Complaint ¶58. Monroe thereafter hired Plaintiff as an intern at SLS for the summer of 1998. Complaint ¶59. Approximately three weeks after Plaintiff was hired, Monroe and Arran Hayes, Chair of the Student Senate, suspended Plaintiff from his position. Complaint ¶60. The five grounds stated for the suspension included: (1) timecard violation; (2) giving legal advice without proper license; (3) misrepresentation of position and authority; (4) failure to give proper notice of absences; and (5) insubordination. Complaint ¶61. Plaintiff was not

aware of any complaints against him prior to the time the charges were served on him. Complaint ¶62.

Helen Gorgas, USM's Department of Student Life acting director, gave Hayes and Monroe the authority to suspend Plaintiff after Monroe told Hayes that Rodway supported Monroe's decision to suspend Plaintiff. Complaint ¶63. Despite Gorgas's knowledge of Plaintiff's previous complaints she never investigated the situation behind Plaintiff's suspension to determine whether Plaintiff had been given any warning prior to the suspension. Complaint ¶68.

Plaintiff complained to the USM Student Senate regarding his suspension and the Senate ordered an investigation into Plaintiff's complaints. Complaint ¶71. The Senate ordered that the Executive Board of the Senate and Rodway have no part in the investigation because they were subjects of the investigation. Complaint ¶72. Plaintiff and the Student Senate entered into a contractual agreement that permitted Plaintiff to be suspended with pay pending completion of the investigation. Complaint ¶74. However, the Executive Board refused to pay Plaintiff because he would not sign a contract drafted by Rodway on behalf of Hayes. Complaint ¶76.

Plaintiff was cleared of all charges except the fifth charge, misrepresentation of position of authority. The Executive Committee conspired with a member of Student Senate Ad-hoc Investigative Committee (SSAIC) to obtain a guilty vote of

the fifth charge. Complaint ¶78. The Student Senate disregarded favorable information and recommendations in favor of Plaintiff. The Executive Board subsequently fired Plaintiff and Hutchinson endorsed the dismissal. Complaint ¶¶79-81.

Plaintiff subsequently forwarded 191 pages of information to Hill and asked for a post-deprivation hearing. Hill did not initiate a hearing until seven months after Plaintiff requested one. Hill told Plaintiff that he would not have the opportunity to cross-examine witnesses or confront his accusers. Hill told Plaintiff that SJA's training policy does not give students the right to cross-examine persons who accuse the student of misconduct. After being told this by Hill, Plaintiff asked Hill not to conduct the hearing. Hill went ahead with the proceeding despite Plaintiff's request and told Plaintiff that the process would go ahead with or without Plaintiff's participation. Complaint ¶¶82-88.

The charge Plaintiff was found guilty of, misrepresentation of position and authority, was based on the signed complaints of Elizabeth Finlayson, acting Executive Director of Freeport Community Services, and Jean Kaestner, acting Family Services Coordinator for Freeport Community Services and Costal Economic Development's Head Start Centers at Freeport and Brunswick. Complaint ¶89. Finlayson stated that Plaintiff told her that he was investigating a sexual abuse case

with the Freeport Police Department involving a head start student in Freeport, Maine. According to Finlayson Plaintiff told her he needed more information about the case and that Plaintiff told her that the matter was very important and that the police were waiting for Plaintiff to talk to Kaestner. Complaint ¶¶91-93.

Kaestner's letter corroborated the information given by Finlayson and stated that Plaintiff called her and said he was with SLS and was investigating a child abuse case in Freeport. Kaestner also stated that Plaintiff tried to gain access to confidential information in a deceptive way. Complaint ¶94.

On September 8, 1998 an article appeared in the student newspaper in the USM Free Press regarding Plaintiff's suspension and the charges made against him. The information was provided to the newspaper by members of the Executive Committee. Complaint ¶97.

During the fall of 1998, Plaintiff testified before a state legislative committee and rebutted Judy Ryan's, acting Vice President of Student Development at USM, assertion that no evidence exists of discrimination at USM. During the hearing Plaintiff also stated that Ms. Ryan's husband, an aid to the Commissioner of Education, may have improperly lobbied the chair of the committee. Complaint ¶100.

Shortly after testifying to the committee, USM police officer James Stanhope served Plaintiff with a cease harassment notice on Plaintiff on behalf of Monroe. The notice stated that Monroe filed a complaint alleging that Plaintiff had been sitting outside SLS offices watching Monroe as she worked and stood outside the Student Senate office while Monroe worked inside. Complaint ¶101.

Officer Stanhope told Plaintiff he was aware of the present lawsuit against the named defendants. He also told Plaintiff that he had notice of the Complaint for about a week prior to serving it on Plaintiff. Stanhope never attempted to question Plaintiff before serving the notice. Notice was served on Plaintiff in the student computer lab in front of other students. Officer Stanhope was in his police uniform when he served the notice on Plaintiff. Complaint ¶¶103-105.

Discussion

Based on the facts above Plaintiff asserts the following federal causes of action: (1) a claim pursuant to 42 U.S.C. §1983 against all defendants; (2) a claim pursuant to 42 U.S.C. §1981 against the University Defendants and Individual University Defendants; (3) a claim pursuant to Title VII of the Civil Rights Act of 1964 against the University Defendants; (4) a violation of 42 U.S.C. §1985(2)&(3) against the University Defendants and Individual University Defendants and (5) a

violation of Title VI of the Civil Rights Act of 1964 against the University Defendants and Individual University Defendants.

I. Plaintiff's Claim pursuant to 42 U.S.C. §1983[1]

A. University Defendants

A plaintiff may make a claim pursuant to section 1983 by demonstrating "First, that the defendants acted under color of state law; and second, that the defendants' conduct worked a denial of rights secured by the Constitution or by federal law." *Rodriguez-Cirilo v.Garcia*, 115 F.3d 50, 52 (1st Cir. 1997). Here, Plaintiff alleges a violation of his constitutional right to due process; a violation of his right to equal protection; and a violation of the Federal Education Rights and Privacy Act (FERPA). The Court addresses each allegation below.

a. Due Process

Plaintiff claims that the University Defendant deprived him of a property interest, namely by terminating his work-study position, in violation of the Due Process Clause. To establish that a property interest exists, a plaintiff must assert that "he has a legally recognized expectation that he will retain his position." *Ortega-*

[1] In addition to those constitutional violations discussed above, Plaintiff asserts a First Amendment violation against the University Defendants and Individual University Defendants. Plaintiff has failed to state a claim under the First Amendment because he has failed to allege sufficient facts to support his conclusory assertion that his complaints were a motivating factor behind his dismissal. *Conward v. Cambridge Sch. Committee*, 171 F.3d 12, 22 (1st Cir. 1998).

Rosario v. Alvarado-Ortiz, 917 F.2d 71, 73 (1st Cir. 1990) (citing *Perry v. Sindermann*, 408 U.S. 593, 599 (1972)). It is not enough the Plaintiff had only a unilateral expectation that he would keep his job. A court determines whether a property interest exists by examining state law and other understandings that secure certain benefits. *Board of Regants of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). Therefore, a legally recognized expectation can arise out of "a statutory job classification, a provision in the contract of employment (express or implied) or an officially sanctioned rule of the workplace." *Ortega-Rosario*, 917 F.2d at 73.

In his Amended Complaint Plaintiff devotes two paragraphs to demonstrate that he had a property interest in his continued employment. Plaintiff asserts:

> 66. The University of Southern Maine Supervisors' Guide to Student Employment denotes a property and liberty interest in student employment by requiring fundamental fairness and provides procedural due process requirements.
>
> 67. The University of Southern Maine Student Senate Personnel Review Board Statement of Policy denotes a property and liberty interest in student employment by requiring fundamental fairness and provides procedural due process requirements to ensure said fairness to employees.

These two assertions made by Plaintiff are insufficient to establish a property interest in his work-study position because they are merely subjective conclusions, not specific factual statements that allege such an interest exists. However, the breadth

of Plaintiff's entire Complaint illustrates that a process was invoked prior to his dismissal and that he was not dismissed from his job until after that process was completed. The fact that a process was invoked prior to his dismissal lends credibility to Plaintiff's assertion that he had a property interest in his work-study position and the Court will proceed with that understanding.

Having determined that Plaintiff had a property interest in his work-study position the Court must next determine if Plaintiff has alleged facts sufficient to establish that he was denied process that was due to him. As the First Circuit Court of Appeals recently stated "[T]he basic requirements of due process are notice of the charges brought against the job-holder and an opportunity to respond to them." *Conward v. Cambridge School Committee*, 171 F.3d 12, 23 (1st Cir. 1999). As Defendants properly point out, Plaintiff's Complaint illustrates that he was in fact given notice of the charges against him, an explanation of the charges against him, and opportunity to respond to the charges. *See* Complaint ¶61 (Plaintiff received a suspension letter outlining the charges against him); ¶71 (Plaintiff complained to the entire Student Senate regarding the charges made against him); ¶72 (an investigation was done prior to the vote to terminate Plaintiff); ¶¶ 86-87 (a post-deprivation hearing was conducted over Plaintiff's objections). Based on the facts asserted by Plaintiff in his Complaint the Court is satisfied that he was provided all the process due to him.

See Id. (finding that tenured public employee was given sufficient process by receiving notice of the charges made against him, an explanation of the charges made against him, and an opportunity to respond to the charges.)

b. Equal Protection

Plaintiff next alleges that the University and the individual University Defendants violated his constitutional right to equal protection. Plaintiff appears to base his equal protection claim on a "policy of 'Failure to Train',[2] racial animus, and retaliatory motive under color of state law . . . ." Complaint ¶121. To establish a violation of the Equal Protection Clause, a plaintiff "must show that he or she is 'the victim of intentional discrimination.'" *Judge v. City of Lowell*, 160 F.3d 67, 75 (1st Cir. 1998) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). A key element to proving an equal protection violation is demonstrating improper motive. *Id.* A plaintiff must not make merely a conclusory allegation of improper motive. *Id.* Instead, the plaintiff must offer "specific, nonconclusory factual allegations giving rise to a reasonable inference of racially discriminatory

[2] Plaintiff's only allegation to support his position that a policy of racial discrimination existed at USM is that "numerous published complaints against the Student Senate dating back over fifteen years from 1999 which include allegations of racial discrimination, unfair labor practices, due process violations, failure to train Student Senators, and incompetence." Complaint ¶36. This is hardly sufficient to support an assertion that an official policy of racial discrimination existed at USM, or for that matter, the Student Senate. *Odom v. Frank*, 3 F.3d 839, 849 (5th Cir. 1993) (speculation and anecdotal information not sufficient to establish a policy of discrimination.).

intent." *Id.* (citing *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989)).

Here, Plaintiff fails to assert any facts to support his assertion that an equal protection violation occurred. Plaintiff argues that he sufficiently establishes disparate treatment by pointing to how school officials took no action when he made complaints, but did take action on complaints made by white students against him. However, Plaintiff has failed to allege any facts to support his conclusion that the disparate treatment was based on the improper motive of race. There are countless explanations to explain why school officials placed more credence to complaints against Plaintiff than to Plaintiff's complaints. *See Glidden v. Atkinson*, 750 F. Supp. 25, 27 (D. Me. 1990)(concluding that an equal protection claim must fail because "the alleged disparate punishments could be explained in countless equally plausible ways.") Plaintiff's factual assertions are hardly sufficient and falls short of alleging the facts necessary to maintain the claim.

c. FERPA violation

Plaintiff next asserts a claim under Section 1983 against the defendants based on their violation of the Federal Education Rights and Privacy Act (FERPA). Congress enacted FERPA to regulate the release of student records. *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F. Supp. 2d 664, 671 (D. Minn. 1999).

The statute provides that no funds will be available to "any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records . . .of students without the written consent of their parents. . . ." 20 U.S.C. §1232g(b)(1). FERPA defines "educational records" as "those records, files, documents and other materials which - (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A).

Although the First Circuit has not addressed whether a plaintiff may assert a 1983 action based on FERPA violation, two other Circuits have held that FERPA creates a federal right that can be asserted under section 1983. *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986); *Tarka v. Franklin*, 891 F.2d 102, 104-05 (5th Cir. 1990). Later district courts' opinions have followed suit. *Achman*, 45 F. Supp. 2d at 672; *Jensen v. Reeves*, 45 F.Supp. 2d 1265 (D. Utah 1999). This Court, like those cited above, concludes that FERPA creates a federal right that a party may enforce by bringing suit under section 1983.

Plaintiff alleges that defendants violated FERPA by releasing "to the USM Free Press and printing or causing to be printing or causing to printed, disciplinary information concerning Burrell." Complaint ¶127. This allegation falls far short of

asserting a claim under FERPA because nowhere in the Complaint does Plaintiff allege that defendants had a policy or custom of releasing such records. Plaintiff's allegation that defendants released his confidential disciplinary records is insufficient to sustain the claim. *See Achman*, 45 F. Supp.2d 664, 673 (granting defendants' motion because plaintiff failed to allege a practice or policy of releasing records).

B. Individual University Defendants

a. Section 1983 claim

Plaintiff also names the Individual University Defendants in his section 1983 action. There is no *respondeat superior* liability under section 1983. *Monell v. Department of Soc. Serv.*, 436 U.S. 658, 691 (1978). "Liability in damages can only be imposed upon officials who were involved personally in the deprivation of constitutional rights." *Ramirez v. Colon,* 21 F. Supp. 2d 96, 98 (D.P.R. 1997) (citing *Pinto v. Nettleship*, 737 F.2d 130, 132 (1st Cir. 1984)).

Plaintiff alleges that the individual defendants violated his right to equal protection and due process by instituting a "policy of 'Failure to Train', racial animus, and retaliatory motive under color of state law . . . ." However, as stated above, Plaintiff was given all the process that he was due, and despite his conclusory assertion, his complaint fails to allege facts with any specificity that any of the named defendants were involved personally in the violation of his constitutional rights.

Accordingly, Plaintiff fails to state a claim against the individual defendants under Section 1983.

b. Notice to Cease Harassment

Plaintiff also asserts a Section 1983 claim against Judy Ryan and Heather Monroe because they "conspired to defame and file a false cease harassment notice against Mr. Burrell" which deprived Plaintiff of his constitutional rights. Plaintiff's assertion notwithstanding, the Court fails to discern how any constitutional violation occurred when the officer served Plaintiff with the cease harassment notice. Accordingly, the Court recommends that this claim be dismissed.

II. Plaintiff's claim pursuant to 42 U.S.C. §1981

Plaintiff next alleges that "the UMS Defendants, pursuant to retaliatory motive, policy of Failure to Train, and racial animus, acted in bad faith and violated Burrell's rights under 42 U.S.C. 1981, terminating his contracts because of Burrell's race." Complaint ¶133. "Section 1981 basically prohibits racial discrimination in the making and enforcement of private contracts." *Huggar v. Northwest Airlines*, 1999 WL59841 (N.D. Ill. 1999). The discrimination alleged must be "both purposeful and based on race." *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 17 (1st Cir. 1989).

Upon reviewing Plaintiff's Complaint, the Court is satisfied that Plaintiff has failed to allege facts to support his claim under section 1981. Plaintiff's Complaint does not contain any factual statements that demonstrate discriminatory treatment. Instead, Plaintiff makes conclusory allegations that the University Defendants did not "properly address Plaintiff's complaints about Heather Monroe (who is white) and SLS FERPA violations" but did address Monroe's complaints against Plaintiff. Complaint ¶ 107. Plaintiff also alleges that defendants took informal action against white employees, but took formal action against him when complaints were made. Complaint ¶ 114. As Defendants properly point out, these conclusory statements are insufficient to support Plaintiff's claim. Nowhere does Plaintiff allege facts that would support his conclusion that the different treatment occurred because of his race. Accordingly, I recommend that the Court DISMISS this claim.

III. Plaintiff's claim pursuant to Title VII

Plaintiff next asserts a claim against the University Defendants and Individual University Defendants pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*. arising from his termination from his work-study position at SLS. Plaintiff alleges that the defendants: terminated him because of his race; terminated him pursuant to a policy of "Failure to Train" which had a disparate impact on him

as an African-American; terminated him in retaliation for complaints he made regarding the institution's violations of FERPA and discriminatory practices.

a. Disparate Impact

Having alleged no direct evidence of discrimination, plaintiff must set forth a prima facie case that he was discriminated against by the defendants. *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 19 (1st Cir. 1999) To establish a prima facie case of discrimination when alleging disparate treatment, the Plaintiff must allege that "he was a member of a protected class and qualified for the employment he held, that his employer took an adverse employment action against him, and that the position remained open for (or was filled by) a person whose qualifications were similar to his." *Id.*

Plaintiff's Complaint does not contain any statements that the work-study position from which he was terminated was thereafter filled by a person with similar qualifications. Further, the conclusory statement that defendant had a policy of a "failure to train" that had a disparate impact on Plaintiff because of his race cannot sustain the claim.

b. Retaliation

Plaintiff next claims that he was terminated from his position because of his complaints about violations of FERPA and past discriminatory practices. Title VII

makes unlawful discrimination against an employee when the employee opposed any violation of Title VII "or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . ." under Title VII. 42 U.S.C. §2000e-3. "To demonstrate a prima facie claim of retaliation, the plaintiff must show by a preponderance of the reliable evidence that (1) []he engaged in a protected activity as an employee, (2) []he was subsequently discharged from employment, and (3) there was a causal connection between the protected activity and the discharge." *Ramos v. Roche Products, Inc.*, 936 F.2d 43, 48 (1st Cir. 1991).

FERPA violations are not practices made unlawful by Title VII. Accordingly, no retaliation claim can be made on that basis. Plaintiff has also failed to allege any facts to establish that he made complaints of Title VII violations at SLS. Plaintiff does state that while employed at SLS he felt that Stover's favoritism towards Monroe and Melissa Gower was discrimination against him because he was a man. However, Plaintiff never asserts in the complaint that he complained about the discrimination to any person, a requirement to sustain a retaliation claim under Title VII. Accordingly, I recommend that this claim be Dismissed.

IV. Plaintiff's claim pursuant to section 1985(2)&(3)

Plaintiff next maintains that pursuant to the defendants' policy of "Failure to Train" the defendants conspired against Plaintiff to deprive him of his civil rights.

However, Section 1985(2) had been found to apply only to direct violations of a party's right to attend or testify in federal court. *See Arroyo-Torres v. Ponce Federal Bank*, 918 F.2d 276 (1st Cir.1990) ("the plain language of the statute and its legislative history indicate, section 1985(2) 'was intended to protect against direct violations of a party or witness's right to attend or testify in federal court.'") Plaintiff does not allege that he was prevented from testifying in any federal case and therefore fails to state a claim under this subsection.

Plaintiff also fails to state a claim under section 1985(3). "An actionable section 1985(3) claim must allege that the (i) the alleged conspirators possessed 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus' and (ii) their alleged conspiracy was 'aimed at interfering with rights . . . protected against private, as well as official, encroachment.'" *Romero-Barcelo v. Hernandez-Agosto*, 75 F.3d 23, 34 (1st Cir. 1996). Other than his conclusory assertions, Plaintiff has simply failed to allege any facts to support his claim that any conspiracy existed against him, or that any of the defendants acted against him because of his race or took their actions based on invidiously discriminatory animus. Accordingly, I recommend that the claim be Dismissed.

V. Plaintiff's claim pursuant to Title VI

Plaintiff claims that defendants violated Title VI by pursuing a policy of "Failure to Train", retaliatory motive, and because of his race, color, and national origin, subjected him to discrimination under programs receiving financial assistance. The statute provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

As stated above, Plaintiff has failed to assert sufficient facts to support his claim that he was subjected to discrimination by the defendants. Therefore I recommend that the Court Dismiss this claim.

Defendants' Rodway, Finlayson and Kaestner Motions to Dismiss

In addition to the University Defendants and Individual University Defendants, Plaintiff asserts a section 1983 action against Defendants Peter Rodway, Jean Kaestner, and Elizabeth Finlayson. The Court will address Plaintiff's claims against these defendants below.

1. Peter Rodway

Plaintiff alleges that Rodway: (1) denied him due process; (2) committed FERPA violations; (3) denied him effective assistance of counsel. For the same reasons discussed above, Plaintiff's due process claim and claim pursuant to FERPA is without merit. Further, Plaintiff's ineffective counsel claim against Rodway is also without merit because he has alleged no facts that show he had a right to counsel. Plaintiff has also failed to allege sufficient facts to support his claim that Rodway played a part in any conspiracy to deprive Plaintiff of his civil rights.

2. Elizabeth Finlayson and Jean Kaestner

Plaintiff asserts a section 1983 claim against Defendants Kaestner and Finlayson. Plaintiff maintains that Defendants: 1) denied him due process; and 2) committed FERPA violations. As stated above, to assert a section 1983 claim against an individual, a plaintiff must allege the individual acted under the "color of law". *Rodriguez-Cirilo*, 115 F.3d at 52. Nowhere in the Complaint does Plaintiff allege that either Defendant acted as a state actor under "color of law". Accordingly, I recommend that the section 1983 claim against Defendants Kaestner and Finlayson be Dismissed.

VI. Plaintiff's State Claims

Plaintiff has asserted the following state claims against one or more of the named defendants: violation of the Maine Whistle Blowers Protection Act, violation of the Maine Human Rights Act, breach of contract, intentional infliction of emotional distress; negligent infliction of emotional distress, violation of Maine's Unpaid Wages Act, violation of Maine Freedom of Access Law, defamation, and punitive damages under state law. Having determined that none of the asserted federal claims have merit, the court declines to extend supplemental jurisdiction over the state claims. *See* 28 U.S.C. § 1367(c)(3); *Also see Miller v. Kennebec County*, 63 F. Supp.2d 75, 85 (D. Me. 1999).

VII. Other Defendants named in the Amended Complaint who were Served After the Amended Complaint was Filed

After the Amended Complaint was filed Defendant served summonses on seven additional individual defendants: Terrence MacTaggert, James Stanhope, Jolene Chonko, Tim Rich, Mike Mullett, Mike Gauthier, and Amy Fairfield. Plaintiff asserts the same federal claims against the seven defendants and bases those claims on the facts outlined above. For reasons identical to those explained above, the Court finds that the federal claims against these defendants have no merit and recommends that the Court *sua sponte* dismiss the claims against them.

Conclusion

For reasons stated above, I recommend that the Court GRANT Plaintiff's Motion to Amend the Complaint, GRANT the University Defendants and the Individual University Defendants Motion to Dismiss, GRANT Defendant Rodway's Motion to Dismiss, and GRANT Defendants Kaestner and Finlayson's Motion to Dismiss. I recommend that the Court *sua sponte* dismiss the claims made against the seven additional parties named in Plaintiff's Amended Complaint and render MOOT Defendants' Motion to Strike dated January 6, 2000, and Plaintiff's Motion for a hearing dated January 12, 2000.

I further recommend that the Court render MOOT the Motions to Dismiss filed prior to those acted upon in this Recommended Decision, Plaintiff's Motion for Order dated June 3, 1999, Plaintiff's Motion to Amend dated September 7, 1999, and Plaintiff's Motion to Strike dated September 24, 1999.

Notice

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 1st day of February, 2000.